In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Early in July 1965, the International Brotherhood of Teamsters Local Union No. 404 began an organizing campaign among the employees at the Company's Holyoke, Massachusetts plant. By letter dated September 20, the Union notified the Company that it represented a majority of its journeymen wire weavers and apprentices, requested that the Company bargain with it, and offered to submit the signed authorization cards for authentication (Pet. App. 43,

66-67). At that time, no apprentices were employed and the Union had obtained signed cards from 11 of the 14 journeymen wire weavers authorizing the Union to represent them (Pet. App. 43-44, 64). President Sinclair, by letter, denied the Union's request because the Company had a "good-faith doubt that Local 404 * * * represents an uncoerced majority of its weaving department employees," "authorization cards are unreliable as a means for determining a Union's majority status," and "the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board" (Pet. App. 67). On November 8, the Union filed a petition for a Board election, and the parties stipulated that the appropriate unit was "all journeymen wire weavers employed at [the] Holyoke plant, excluding all other employees" (G.C. Exh. 1(b); Pet. App. 64).

From this point forward until the election on December 9, President Sinclair endeavored to undermine the Union. His efforts consisted principally of reminders of a 13-week strike in 1952 which had led to the demise of another union and put the Company in an allegedly precarious financial position, and of aspersions on the Teamsters' honesty and strike tactics. Thus, two or three weeks before the election he sent the wire weavers a pamphlet which emphasized, *inter alia*, that the Teamsters Union was a "strike happy outfit," which could again close the wire weaving department and the plant (Pet. App. 35, 51-52). On November 30, Sinclair sent a letter to the wire weavers further reminding them of the disastrous effects

of the 1952 strike, and adding that "a strike can still close the Holyoke plant" (Pet. App. 52-53); he stressed, as he had in previous letters (Pet. App. 49-50), that the company which recently had purchased the plant was "interested in profits and not pressure." On December 1, he sent them another letter, warning that the Union was involved with "serious crimes," "racketeering," and "threats to run down children," and that, if it won the Board election, it would be difficult to get another election to vote it out (Pet. App. 53).

On December 7, Sinclair sent the wire weavers a four-page leaflet which purported to be an obituary of the companies in the Holyoke-Springfield area that had fallen victim to union demands and had gone out of business,[1] eliminating some 3500 jobs in the area. The leaflet concluded by suggesting that the employees drive past these plants before deciding to vote for the Union. (Pet. App. 53-54.) On December 8, the day before the Board election, Sinclair passed out another handbill in the same vein (Pet. App. 55). That same afternoon, he personally addressed the wire weavers in the plant. He again reminded the employees of the Company's precarious financial position; that the new parent corporation could afford to and would close the Company in the event of a strike; and that it was unlikely that they could obtain other employment, because of their age and limited education (Pet. App.

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[1] Sinclair admitted at the hearing that he had no objective basis for linking union demands to the demise of these companies (Pet. App. 54).

55-56). The Union lost the next day's election by one vote, 7 to 6.

2. The Board found that the above-described letters, pamphlets, and speeches by President Sinclair, considered as a whole and in the light of his earlier letters and speeches, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." Accordingly, the Board concluded that, by the foregoing conduct, the Company violated Section 8(a)(1) of the Act. (Pet. App. 58.) The Board further found that the Union had valid authorization cards from a majority of the employees when it requested recognition on September 20; that the Company declined recognition, not because of a good faith doubt as to the Union's majority status, but in order to gain time to dissipate that status;[2] and that the Company thus violated Section 8(a)(5) and (1) (Pet. App. 67-70). The Board set the election aside (Pet. App. 62-64) and ordered the Company to cease and desist from the unfair labor practices found and to bargain, upon request, with the Union (Pet. App. 72-74).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 33-40).

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[2] The Board found that the Company was under no doubt as to the unit in which recognition was sought, in view of its subsequent stipulation in the representation proceeding (p. 2, *supra;* Pet. App. 68-69).

3. The third question presented (Pet. 2)—whether the Board and the court below properly concluded that President Sinclair's speeches and other statements constituted restraint and coercion prohibited by Section 8(a)(1) of the Act—does not warrant review. The determination whether an employer's remarks on unionization constitute an expression of views and opinion protected by Section 8(a)(1) turns primarily on the facts of the particular case. As the court of appeals correctly stated, "[w]hether an employer has used language that is coercive in its effect is a question essentially for the specialized experience of the Board," and "in considering coercive effect the test is the totality of the circumstances." (Pet. App. 38, 37, and cases there cited.)[3]

The remaining issue (Pet. 2, questions 1 and 2) is whether an employer must always be deemed to have had a good faith doubt in refusing to recognize a union that based a claim for representative status solely upon its possession of authorization cards signed by a majority of the employees, irrespective of the unfair labor practices he may have committed in opposing the union after receiving its demand. This question is basically the same as that presented by the Board's petition in No. 573, *National Labor Relations Board* v. *Gissel Packing Co., et al.* (see *e.g.* the petition in No. 573 at p. 16), where the Court of

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[3] *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, 409, n. 3, is not to the contrary. Since the statement in the letter of March 4 was not alleged as an independent violation of Section 8(a)(1) of the Act, the Court had no occasion to consider that issue. Cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477.

Appeals for the Fourth Circuit answered in the affirmative. Accordingly, the Court may desire to defer ruling on the present petition until disposition of *Gissel*. The Board believes, however, that the court below correctly answered this question in the negative, in accordance with the principle ordinarily applied in the courts of appeals, and that it properly enforced the order to bargain based on the Board's finding that the Company's refusal to bargain with the Union had not been motivated by good faith doubt of the Union's majority status and thus violated Section 8(a)(5) of the Act.

Respectfully submitted.

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